



NATIONAL CREDIT UNION ADMINISTRATION

12 CFR Part 701

RIN 3133-AF15

Temporary Regulatory Relief in Response to COVID-19—Extension

AGENCY: National Credit Union Administration (NCUA).

ACTION: Final rule and temporary final rule; extension.

SUMMARY: The NCUA Board (Board) is further extending its temporary final rule, which modified certain regulatory requirements to help ensure that federally insured credit unions (FICUs) remain operational and can address economic conditions caused by the COVID-19 pandemic. The temporary final rule issued by the Board in April 2020 temporarily raised the maximum aggregate amount of loan participations that a FICU may purchase from a single originating lender to the greater of \$5,000,000 or 200 percent of the FICU's net worth. The rule also temporarily suspended limitations on the eligible obligations that a Federal credit union (FCU) may purchase and hold. In addition, given physical distancing practices necessitated by COVID-19, the rule also tolled the required timeframes for the occupancy or disposition of properties not being used for FCU business or that have been abandoned. The temporary amendments were originally scheduled to expire on December 31, 2020. The Board subsequently extended their effectiveness until December 31, 2021. Due to the continued impact of COVID-19, the Board has decided it is necessary to further extend the effective period of these temporary modifications until December 31, 2022.

DATES: This rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] except for the amendment to § 701.23 in instruction 3.b., which is effective April 1, 2022. The expiration date of the temporary final rule published on April 21, 2020 (85 FR 22010), and extended by final rule published on December 22, 2020 (85 FR 83405), is further extended through December 31, 2022.

FOR FURTHER INFORMATION CONTACT: *Policy and Analysis:* Victoria Nahrwold, Office of Examination and Insurance, at (703) 548-2633; *Legal:* Ariel Pereira, Senior Staff Attorney, Office of General Counsel, at (703) 518-6540; or by mail at: National Credit Union Administration, 1775 Duke Street, Alexandria, Virginia 22314.

SUPPLEMENTARY INFORMATION:

- I. Background
- II. Legal Authority
- III. The Regulatory Amendments
- IV. Regulatory Procedures

I. Background

The COVID-19 pandemic has created uncertainty for FICUs and their members. The Board continues to work with federal and state regulatory agencies, in addition to FICUs, to assist FICUs in managing their operations and to facilitate continued assistance to credit union members and communities impacted by the COVID-19 pandemic. In April 2020, as part of these ongoing efforts, the Board temporarily modified certain regulatory requirements to help ensure that FICUs remain operational and liquid during the COVID-19 pandemic.¹ The Board concluded that the amendments would provide FICUs necessary additional flexibility in a manner consistent with the NCUA's responsibility to maintain the safety and soundness of the credit union system. The temporary amendments were to remain in place through the end of calendar year 2020 unless the Board took action to extend the date. In December 2021, the Board concluded that continuing economic uncertainty merited a further extension of the amendments until December 31, 2021.²

¹ 85 FR 22010 (Apr. 21, 2020).

² 85 FR 83405 (Dec. 22, 2020).

The economic environment is a key determinant of credit union performance. While the recovery in economic activity and labor markets is expected to continue, it also poses challenges. The NCUA, like credit unions, needs to plan and prepare for a range of economic outcomes that could affect credit union performance. This includes ensuring a regulatory environment that provides FICUs with the flexibility necessary to cope with and address the range of potential COVID-19 impacts.

Due to the continuing impact of the COVID-19 pandemic on FICUs and their members, the Board has determined that it is necessary to again extend the effectiveness of these temporary provisions. The temporary amendments will remain in place through December 31, 2022.

II. Legal Authority

The Board is issuing this temporary final rule pursuant to its authority under the Federal Credit Union Act (Act).³ The Act grants the Board a broad mandate to issue regulations governing both FCUs and, more generally, all FICUs. For example, section 120 of the Act is a general grant of regulatory authority and authorizes the Board to prescribe rules and regulations for the administration of the Act.⁴ Section 209 of the Act is a plenary grant of regulatory authority to issue rules and regulations necessary or appropriate for the Board to carry out its role as share insurer for all FICUs.⁵ Other provisions of the Act confer specific rulemaking authority to address prescribed issues or circumstances.⁶ Accordingly, the Act grants the Board broad rulemaking authority to ensure that the credit union industry and the NCUSIF remain safe and sound.

III. The Regulatory Amendments

A. Aggregate limit on loan participation purchases (Section 701.22(b)(5)(ii)).

³ 12 U.S.C. 1751 *et seq.*

⁴ 12 U.S.C. 1766(a).

⁵ 12 U.S.C. 1789.

⁶ An example of a provision of the Act that provides the Board with specific rulemaking authority is section 207 (12 U.S.C. 1787), which is a specific grant of authority over share insurance coverage, conservatorships, and liquidations.

The Board's regulation at § 701.22 limits the aggregate amount of loan participations that a FICU may purchase from any one originating lender to the greater of \$5,000,000 or 100 percent of the FICU's net worth.⁷ Under the temporary regulatory amendments, the aggregate limit below which a waiver from the appropriate NCUA Regional Director is not required is temporarily raised to the greater of \$5,000,000 or 200 percent of a FICU's net worth.

The Board continues to believe that, as currently formulated in § 701.22, the limitation may be overly prescriptive during this time. Additional regulatory flexibility continues to be especially warranted to deal with the economic impact of the COVID-19 pandemic, which may result in additional stress on credit union balance sheets, potentially requiring robust liquidity management.

B. Purchase, sale, and pledge of eligible obligations (Section 701.23(b)).

The Board's regulations in § 701.23 generally require that purchased eligible obligations be obligations of a purchasing FCU's members and loans the FCU is empowered to grant or the loan is refinanced to be one the FCU is empowered to grant. Section 701.23(b)(2) provides certain limited exceptions to the general requirements for well-capitalized FCUs that have composite CAMEL ratings of "1" or "2."⁸ The regulations authorize these FCUs to purchase the eligible obligations of any FICU or of any liquidating credit union without regard to whether they are obligations of the purchasing FCU's members, provided they are loans the FCU is empowered to grant or the loan is refinanced to be one it is empowered to grant.

In the April 2020 temporary final rule, the Board temporarily amended its regulations to authorize FCUs with CAMEL composite ratings of 1, 2, or 3 to purchase eligible obligations of FICUs and liquidating credit unions irrespective of whether the obligation belongs to the purchasing FCU's members and without regard to whether they are loans the credit union is

⁷ 12 CFR 701.22(b)(5)(ii).

⁸ Section 701.23 also contains exceptions to the membership requirement for certain purchases of student loans and real estate loans that an FCU purchases to complete a pool for sale. The Board established this exception in a 1979 final rule. 44 FR 27068 (May 9, 1979).

empowered to grant or are refinanced to ensure the obligations are ones the purchasing credit union is empowered to grant. This change did not alter the requirement for a purchasing FCU to be well-capitalized under § 701.23(b)(2).⁹ Due to the ongoing and unforeseeable impact of the COVID-19 pandemic, the Board believes it appropriate to extend these temporary provisions until the close of December 31, 2022. The Board recognizes that the need to support the extension of credit and facilitate the downstream loan purchases as a tool to manage liquidity remains, and likely will remain for the foreseeable future.

The Board reiterates that this change allows FCUs to continue to hold obligations purchased pursuant to this temporary final rule subsequent to the rule's expiration. The standard requirements applicable to the purchase of obligations under § 701.23 will resume after the expiration of the temporary provisions at the close of December 31, 2022, unless extended, and will apply to all future purchases, including to purchases of obligations previously acquired under the provisions of this temporary final rule. The Board also reiterates that the restrictions temporarily relieved in § 701.23 do not apply to state-chartered, federally insured credit unions. Any such restrictions applicable to state-chartered credit unions would be based on state laws or regulations. This temporary final rule does not modify the current authority of FCUs under § 701.23 to purchase the obligations of a liquidating credit union without regard to whether the obligations belong to the purchasing FCU's members.

In addition to the regulatory amendments discussed above, this final rule makes a technical change to § 703.23(i)(2) to conform the terminology used in the provision with that of the Board's final rule on the CAMELS rating system, which will become effective on April 1, 2022.¹⁰

C. FCU occupancy and disposal of acquired premises (Section 701.36(c)).

⁹ Generally, credit unions with a CAMEL composite rating lower than 3 are considered to be in "troubled condition" under the NCUA's regulations. 12 CFR 700.2.

¹⁰ 86 FR 59282 (Oct. 27, 2021).

The Board's regulation in § 701.36 provides that if an FCU acquires premises, including unimproved land or unimproved real property, it must partially occupy them "no later than six years after the date of acquisition," subject to the NCUA granting a waiver.¹¹ Further, an FCU must make diligent efforts to dispose of abandoned premises and any other real property it does not intend to use in transacting business. Additionally, the FCU must advertise for sale premises that have been abandoned for four years.¹² Given the impact of physical distancing measures adopted by many states and localities, the April 2020 temporary final rule tolls the regulatory mandated timeframes in the rule.

Due to the ongoing nature of the COVID-19 pandemic and its continued impact on FICUs, the Board has decided it is necessary to extend the effectiveness of this temporary amendment until the close of December 31, 2022. Physical distancing practices continue to be a key component of preventing the spread of COVID-19¹³ and make compliance with § 701.36 difficult. This temporary deferral will continue to provide FCUs additional flexibility to comply with the prescribed time periods, while still complying with the statutory and regulatory goals of ensuring that properties acquired or held by FCUs are used for credit union business.

IV. Regulatory Procedures

A. Administrative Procedure Act

The Board is issuing the extension of the temporary final rule without prior notice and the opportunity for public comment and the delayed effective date ordinarily prescribed by the Administrative Procedure Act (APA).¹⁴ Pursuant to the APA, general notice and the opportunity for public comment are not required with respect to a rulemaking when an "agency for good

¹¹ 12 CFR 701.36(c)(1).

¹² 12 CFR 701.36(c)(2).

¹³ See Fabio Motta, *Face masks and distancing are most effective measures in reducing COVID-19 spread, study finds, as experts clamor for U.S. to expand booster program*, (November 18, 2021), ("Wearing a face mask and physically distancing from others are the most effective public safety measures against the coronavirus-borne illness COVID-19 and have a statistically significant impact on reducing the spread, according to a new global study."), <https://www.marketwatch.com/story/face-masks-and-distancing-are-most-effective-measures-in-reducing-covid-19-spread-study-finds-as-experts-clamor-for-u-s-to-expand-booster-program-11637251008>

¹⁴ 5 U.S.C. 551 *et seq.*

cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”¹⁵

The Board believes that the public interest is best served by implementing the extension of the previously issued temporary final rule immediately upon publication in the *Federal Register*. The Board notes that the COVID-19 pandemic is unprecedented. It is a continually changing situation and difficult to anticipate how the disruptions caused by the crisis will manifest themselves within the financial system and how individual credit unions may be impacted. Because of the widespread impact of a pandemic and the temporary nature of both the relief contemplated by the temporary final rule and this extension of such relief, the Board believes it is has good cause to determine that ordinary notice and public procedure are impracticable and that moving expeditiously to extend the temporary final rule is in the best of interests of the public and the FICUs that serve that public. The extension of these temporary regulatory changes are proactive steps that are designed help FICUs cope with the economic impact of the COVID-19 pandemic, which may result in additional stress on credit union balance sheets, potentially requiring robust liquidity management over the course of 2022. The changes are undertaken with expedience to ensure the maximum intended effects remain in place.

The Board values public input in its rulemakings and believes that providing the opportunity for comment enhances its regulations. Accordingly, the Board often solicits comments on its rules even when not required under the APA, such as for the rules it issues on an interim-final basis. The Board, however, notes that the provisions extended in this rule are temporary in nature, and designed specifically to help credit unions affected by the COVID-19 pandemic. The extension of the amendments made by this temporary final rule will automatically expire at the close of December 31, 2022, and are limited in number and scope. For these

¹⁵ 5 U.S.C. 553(b)(3).

reasons, the Board finds that there is good cause consistent with the public interest to issue the rule without advance notice and comment.

The APA also requires a 30-day delayed effective date, except for: (1) substantive rules which grant or recognize an exemption or relieve a restriction; (2) interpretative rules and statements of policy; or (3) as otherwise provided by the agency for good cause.¹⁶ Because the rules relieve currently codified limitations and restrictions, the extension of the temporary final rule is exempt from the APA's delayed effective date requirement. As an alternative basis to make the rule effective without the 30-day delayed effective date, the Board finds there is good cause to do so for the same reasons set forth above regarding advance notice and opportunity for comment.

B. Congressional Review Act

For purposes of the Congressional Review Act,¹⁷ the Office of Management and Budget (OMB) makes a determination as to whether a final rule constitutes a “major” rule. If the OMB deems a rule to be a “major rule,” the Congressional Review Act generally provides that the rule may not take effect until at least 60 days following its publication. The Congressional Review Act defines a “major rule” as any rule that the Administrator of the Office of Information and Regulatory Affairs of the OMB finds has resulted in or is likely to result in (A) an annual effect on the economy of \$100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies or geographic regions, or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.¹⁸

For the same reasons set forth above, the Board is adopting the extension of the temporary final rule without the delayed effective date generally prescribed under the

¹⁶ 5 U.S.C. 553(d).

¹⁷ 5 U.S.C. 801-808.

¹⁸ 5 U.S.C. 804(2).

Congressional Review Act. The delayed effective date required by the Congressional Review Act does not apply to any rule for which an agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.¹⁹ In light of current market uncertainty, the Board believes that delaying the effective date of the extension of the temporary final rule would be contrary to the public interest for the same reasons discussed above.

As required by the Congressional Review Act, the Board will submit the final rule and other appropriate reports to Congress and the Government Accountability Office for review.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*) requires that the Office of Management and Budget (OMB) approve all collections of information by a Federal agency from the public before they can be implemented. Respondents are not required to respond to any collection of information unless it displays a valid OMB control number.

In accordance with the PRA, the information collection requirements included in this temporary final rule extension have been submitted to OMB for approval under control numbers 3133-0141, 3133-0127 and 3133-0040.

D. Executive Order 13132, on Federalism

Executive Order 13132²⁰ encourages independent regulatory agencies to consider the impact of their actions on state and local interests. The NCUA, an independent regulatory agency, as defined in 44 U.S.C. 3502(5), voluntarily complies with the Executive order to adhere to fundamental federalism principles. The extension of the temporary final rule will not have substantial direct effects on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of

¹⁹ 5 U.S.C. 808.

²⁰ Executive Order 13132 on Federalism, was signed by former President Clinton on August 4, 1999, and subsequently published in the *Federal Register* on August 10, 1999 (64 FR 43255).

government. The Board has therefore determined that this rule does not constitute a policy that has federalism implications for purposes of the Executive order.

E. Assessment of Federal Regulations and Policies on Families

The NCUA has determined that the extension of the temporary final rule will not affect family well-being within the meaning of Section 654 of the Treasury and General Government Appropriations Act, 1999.²¹

F. Regulatory Flexibility Act (RFA)

The Regulatory Flexibility Act (RFA) generally requires that when an agency issues a proposed rule or a final rule pursuant to the APA or another law, the agency must prepare a regulatory flexibility analysis that meets the requirements of the RFA and publish such analysis in the Federal Register. Specifically, the RFA normally requires agencies to describe the impact of a rulemaking on small entities by providing a regulatory impact analysis. For purposes of the RFA, the Board considers credit unions with assets less than \$100 million to be small entities.

As discussed previously, consistent with the APA, the Board has determined for good cause that general notice and opportunity for public comment is unnecessary, and therefore the Board is not issuing a notice of proposed rulemaking. Rules that are exempt from notice and comment procedures are also exempt from the RFA requirements, including conducting a regulatory flexibility analysis, when among other things the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. Accordingly, the Board has concluded that the RFA's requirements relating to initial and final regulatory flexibility analysis do not apply.

List of Subjects in 12 CFR Part 701

Aged, Civil rights, Credit, Credit unions, Fair housing, Individuals with disabilities, Insurance, Mortgages, Reporting and recordkeeping requirements.

²¹ Pub. L. 105–277, 112 Stat. 2681 (1998).

By the NCUA Board, this 17th day of December 2021.

Melane Conyers-Ausbrooks,
Secretary of the Board.

For the reasons discussed in the preamble, the Board amends 12 CFR part 701 as follows:

PART 701 – ORGANIZATION AND OPERATION OF CREDIT UNIONS

1. The authority citation for part 701 continues to read as follows:

Authority: 12 U.S.C. 1752(5), 1755, 1756, 1757, 1758, 1759, 1761a, 1761b, 1766, 1767, 1782, 1784, 1785, 1786, 1787, 1788, 1789. Section 701.6 is also authorized by 15 U.S.C. 3717. Section 701.31 is also authorized by 15 U.S.C. 1601 *et seq.*; 42 U.S.C. 1981 and 3601-3610. Section 701.35 is also authorized by 42 U.S.C. 4311-4312.

§ 701.22 [Amended]

2. In § 701.22(e), remove the date “December 31, 2021” and add in its place the date “December 31, 2022”.

§ 701.23 [Amended]

3. Amend § 701.23 as follows:

a. In paragraph (i) introductory text, remove the date “December 31, 2021” and add in its place the date “December 31, 2022”; and

b. Effective April 1, 2022, in paragraph (i)(2) remove the term “CAMEL”, and add in its place the term “CAMELS.”

§ 701.36 [Amended]

4. In § 701.36(c)(3), remove the date “December 31, 2021” and add in its place the date “December 31, 2022”.

